

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BRIAN CARLOS, on behalf of)
himself and all other)
similarly situated,)

Plaintiff,)

v.)

PATENAUDE & FELIX, A.P.C.,)

Defendant.)

Case No. 3:14-cv-00921-MO

August 18, 2015

Portland, Oregon

Oral Argument

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL W. MOSMAN

UNITED STATES DISTRICT COURT JUDGE

APPEARANCES

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(P R O C E E D I N G S)

THE CLERK: Your Honor, this is the time and place set for oral argument in Case No. 3:14-cv-921-MO, Brian Carlos v. Patenaude & Felix A.P.C.

Counsel, can you introduce yourself for the record.

MR. PASSANNANTE: Good morning. Mark Passannante on behalf of plaintiff, Your Honor. With me is Bret Knewtson.

MR. EIDENBERG: Peter Eidenberg on behalf of defendants, and Kelly Huedepohl as well, Your Honor.

THE COURT: Thank you all for being here.

The first issue I want to discuss is whether this case involves a written contract or not. You've briefed that fairly extensively. I've taken a close look at it also. So I'm just going to start by inviting you to add something that you may not have already put in your briefing, if you have anything like that, to your arguments about whether this involves a written contract or not.

I'll start with plaintiffs.

MR. PASSANNANTE: Judge, I think that other than restating what we have in the brief, I think it was fairly extensively addressed. I think our main point is that the best that they have is the application, that there was a box clicked but no signature. There was a change in terms, and as Mr. Carlos pointed out in his declaration, the credit limit wasn't disclosed to him until after he applied for it. The

1 card -- and the card and the contract never took effect until
2 he actually used the card. So we don't believe there was a
3 written contract under the original statute of limitations.

4 THE COURT: Do you agree it's a matter that can be
5 resolved as a question of law at summary judgment?

6 MR. PASSANNANTE: Yes, Your Honor.

7 THE COURT: So although he's provided a statement
8 about his experience in connection with his own individual
9 contract, whether these things are, in fact, written contracts
10 or not, you acknowledge is a legal question?

11 MR. PASSANNANTE: Yes, Your Honor. We don't believe
12 there's any circumstances that -- there's several different
13 ways that the contract can be formed. You can go online, you
14 can call in, I think you can -- there's a little check-the-box
15 mailing that you can mail back in. Our contention is that the
16 signature on the application does not constitute and cannot
17 constitute a written contract. So whether somebody called in
18 or applied for the card in some other fashion shouldn't matter,
19 and whether or not this is a written contract --

20 THE COURT: Well, I guess that's the import of my
21 question, is that you get to summary judgment either by no
22 material fact dispute --

23 MR. PASSANNANTE: Correct.

24 THE COURT: -- that is on a fact issue that a
25 rational trier of fact couldn't go any other way even in the

1 light most favorable to the other side, or you get there by
2 virtue of the issue presented being a question of law.

3 MR. PASSANNANTE: That's correct.

4 THE COURT: And this is the latter, right?

5 MR. PASSANNANTE: That's correct.

6 THE COURT: Thank you, sir.

7 MR. PASSANNANTE: Thank you.

8 THE COURT: How about for defendants?

9 MS. HUEDEPOHL: So, Your Honor, I disagree with
10 plaintiff's counsel that this is an issue that can be decided
11 as a matter of law for each and every contract that Capitol One
12 enters into. Plaintiff's contract is written as a matter of
13 law because he logged into Capitol One's website, he applied
14 after reviewing and having made available to him the material
15 terms, and to the extent any material terms were not part of
16 that application, they were enclosed in the envelope that
17 included the credit card, and he signed it. Under those
18 circumstances, as a matter of law, Virginia would find that
19 plaintiff's contract is written.

20 THE COURT: And those facts, you would agree -- at
21 least the bare facts about how he entered into this contract
22 are currently undisputed?

23 MS. HUEDEPOHL: Yes, Your Honor. Plaintiff disputes
24 that he intended to sign the document.

25 THE COURT: Sure. That's the import of the facts,

1 but that he entered into it essentially through an online
2 arrangement, as opposed to a phone call or something else, that
3 is not disputed?

4 MS. HUEDEPOHL: Yes, Your Honor, that is not
5 disputed.

6 THE COURT: The basic mechanism for doing that is
7 also not disputed, do you agree?

8 MS. HUEDEPOHL: Yes, Your Honor.

9 THE COURT: So that's why at least in this case you'd
10 contend that the remaining issue of whether what happened
11 constitutes a written contract or not is a legal question
12 susceptible to resolution at summary judgment?

13 MS. HUEDEPOHL: Yes, Your Honor.

14 THE COURT: But you think that there may be other
15 cases where it would not be so susceptible because the basic
16 facts are disputed, something like that?

17 MS. HUEDEPOHL: Because the basic facts cannot be
18 known without individual inquiry. Once it is determined
19 whether a particular debtor entered into a contract with
20 Capitol One over a telephone, by sending back the mailed
21 solicitation, or logging online, from that point there may be
22 no disputed facts and it may become resolvable as a matter of
23 law. But in order to determine whether a particular contract
24 was written or unwritten, one -- the Court would need to know
25 how that contract actually got formed.

1 THE COURT: Your contention, I assume, is that all
2 contracts entered into in fundamentally this way are written?

3 MS. HUEDEPOHL: Yes, Your Honor.

4 THE COURT: I assume you'd take the same position
5 with regard to the mail-in?

6 MS. HUEDEPOHL: With the returned mailer? Yes, Your
7 Honor.

8 THE COURT: So maybe you take a different position
9 with regard to a phone call? Is that how this works?

10 MS. HUEDEPOHL: Depending on the circumstances, Your
11 Honor.

12 THE COURT: All right.

13 MS. HUEDEPOHL: If, Your Honor, all of the material
14 terms were included with the credit card, and the debtor
15 acknowledges signing the credit card, then under Virginia law,
16 where one party to a contract signs a document that is provided
17 along with other documents that comprise the contract, that --
18 the signed document operates as the signature sheet for the
19 entire contract.

20 THE COURT: Thank you.

21 The second issue is when does the statute of
22 limitations start running, and the parties, of course, disagree
23 as to what Virginia law says about that. I'm assuming from
24 your briefing that the parties agree that it is, in fact,
25 Virginia law that controls this question.

1 Is that right for plaintiffs?

2 MR. PASSANNANTE: That's correct, Your Honor.

3 THE COURT: And for the defense?

4 MS. HUEDEPOHL: Unless there is a reason that Oregon
5 law would apply because there is a material difference that
6 provides one party either an insufficient opportunity to bring
7 an action or an insufficient opportunity to defend against an
8 action. If that's the case, then Oregon's accrual law applies.

9 THE COURT: So we start with Oregon, and Oregon sends
10 us to Virginia unless there's this critical difference. And
11 the parties haven't really pointed out that critical difference
12 on these facts, right?

13 MS. HUEDEPOHL: Your Honor, if Virginia approves the
14 first minor breach and requires a creditor to sue within three
15 years of the first minor breach, that is a critical difference
16 from Oregon law. Oregon law gives the debtor and the creditor
17 an opportunity to work out that one single breach by allowing
18 the statute to restart whenever the debtor makes a payment.

19 THE COURT: Well, let's start with Virginia law.
20 It's your contention that Virginia law does the same thing --
21 right? -- that the statute of limitations doesn't begin with
22 the first breach if there's some kind of workout going on?

23 MS. HUEDEPOHL: Your Honor, under Virginia law, this
24 is actually an open question. The breach under the contract
25 occurs when Capitol One declares -- actually declares the party

1 to be in default, which in this case, if it's the charge-off
2 date, did not occur until 2008.

3 However, no Virginia court has interpreted, that
4 defendant is aware of, a similar contractual provision to
5 determine when the breach runs.

6 There's also a question, Your Honor, about whether or
7 not this type of account qualifies as an open account under
8 Virginia law. If it does, then Virginia Statute 8.01-249
9 explicitly states that accrual occurs on the date of last
10 payment or last purchase, whichever is later. Virginia courts
11 haven't addressed that issue, Your Honor.

12 It is our -- it is defendant's contention that under
13 the terms of this contract, the breach occurred on the date of
14 either charge-off when default has occurred or on the date when
15 the first lawsuit was filed in 2009, which is the first date
16 that Capitol One demanded payment in full from plaintiff.

17 THE COURT: And those two dates are?

18 MS. HUEDEPOHL: The first lawsuit was filed in
19 October of 2009. I have that date, Your Honor. One moment.

20 THE COURT: August 6th, '09?

21 MS. HUEDEPOHL: That may well be, Your Honor.

22 THE COURT: Is that right?

23 MS. HUEDEPOHL: August 5th, 2009, I have, Your Honor.

24 THE COURT: And the charge-off date?

25 MS. HUEDEPOHL: Is -- I apologize, Your Honor. I'll

1 have that date in just one moment. But I believe it was in
2 August of 2009.

3 THE COURT: So let's go backwards just a little.

4 MS. HUEDEPOHL: Excuse me. August 11, 2008. My
5 apologies, Your Honor.

6 THE COURT: You agree that in November, probably
7 November 3rd of '06, plaintiff's account balance does exceed
8 his credit limit, right?

9 MS. HUEDEPOHL: Yes, Your Honor.

10 THE COURT: In violation of the terms of his
11 agreement?

12 MS. HUEDEPOHL: Yes, Your Honor -- well, the credit
13 limit -- if the credit limit is exceeded, the account contract
14 provides that fees may be collected and it can be considered a
15 default, but it is not an automatic default that requires
16 payment in full of the balance.

17 THE COURT: And that's fundamentally your reason why
18 you think the statute doesn't begin running on that date?

19 MS. HUEDEPOHL: Yes, Your Honor. Unlike a demand
20 note, credit cards are very heavily regulated by federal law,
21 and there are certain circumstances under which payment in full
22 can be demanded. In all other circumstances, the creditor must
23 permit the debtor either five years to pay the balance in full
24 or a certain minimum percentage of the balance. It's
25 essentially based on what they have been charging prior to the

1 closure of the account. But this is a highly regulated
2 account, and the creditor must demand payment from the debtor
3 before it is actually due. This makes it a material
4 distinction from a demand note.

5 THE COURT: So you'd apply the same reasoning to the
6 next significant event, which is the last minimum payment made
7 by plaintiff before he's in any kind of third-party
8 arrangement, in the end of January of '07?

9 MS. HUEDEPOHL: Yes, Your Honor.

10 THE COURT: Same basic structure, which is that
11 you're not at liberty to simply call the entire balance in and
12 demand everything on that date?

13 MS. HUEDEPOHL: Well, you're not at liberty to say
14 that the entire balance is called in until you've given that
15 notice.

16 THE COURT: There's a period of time between the last
17 minimum payment, January 31 of '07, and April of '07, when
18 Capitol One receives this third-party debt management agency
19 payment plan?

20 MS. HUEDEPOHL: Yes, Your Honor.

21 THE COURT: What with regard to the statute of
22 limitations, in your view, is going on during that period of
23 time?

24 MS. HUEDEPOHL: During that period of time, Capitol
25 One is on notice that plaintiff may have engaged in a permanent

1 or material breach of his contract. Capitol One is at that
2 period of time at liberty to make a determination is it going
3 to continue to work with plaintiff and keep the account open or
4 keep it subject to certain term -- repayment terms, or is it
5 instead going to declare that plaintiff, in fact, owes the full
6 balance.

7 THE COURT: So while you don't yet know if this
8 notice from a third-party manager is going to come in at all,
9 if it had never come in, then your position is that the statute
10 still wouldn't have begun to run, even though the plaintiff had
11 quit paying and there had been a few months that the plaintiff
12 had quit paying, until Capitol One made a decision to demand
13 payment?

14 MS. HUEDEPOHL: Yes, Your Honor.

15 THE COURT: And it's the letter or some other notice
16 demanding payment that starts the statute?

17 MS. HUEDEPOHL: Yes, Your Honor. Potentially also
18 charge-off on the basis of the federal law that I cited in our
19 reply brief, if Capitol One, concurrent with the charge-off,
20 made the decision the debt was unlikely to be paid. That is
21 one element. We have no evidence of that in this case, Your
22 Honor.

23 THE COURT: And that could -- that window where
24 there's no payment being made but no demand from Capitol One
25 yet either could extend for quite some period of time, couldn't

1 it?

2 MS. HUEDEPOHL: Potentially, yes, Your Honor.

3 THE COURT: With no real limiting principle on how
4 long it extends, and the statute not running until the demand
5 is made?

6 MS. HUEDEPOHL: Your Honor, under the Truth in
7 Lending Act, that period actually is capped at six months. The
8 creditor is required to charge off balances at six months with
9 no payment.

10 THE COURT: So the maximum you could have waited if
11 no third-party manager had popped its head up would have been
12 six months?

13 MS. HUEDEPOHL: Yes, Your Honor.

14 THE COURT: And then I take it your view is that with
15 the third-party manager showing up, that period in which
16 Capitol One had not yet started the clock running, according to
17 your view, by it not yet making any demand or charge-off, was
18 extended because you couldn't have done so while still working
19 with this third-party manager and plaintiff?

20 MS. HUEDEPOHL: Yes, Your Honor. And also because
21 the third-party manager, when it submitted payment to Capitol
22 One, it included information with that payment sufficient to
23 identify the payment to Mr. Carlos's specific account. When it
24 did that, it restarted the statute of limitations under
25 Virginia law. Virginia, if there is a writing that is

1 sufficient to identify a payment to a particular debt, Virginia
2 courts imply from that writing a promise to pay the debt. And
3 when that happens, it restarts the statute of limitations.

4 THE COURT: I don't remember the name, I'm sorry, but
5 the case you cite really -- for that proposition sort of states
6 the opposite from which you get the inference that this would
7 be the situation. What I mean by that is in the case you cite,
8 the courts find no sufficient identification of the payment to
9 the borrower, and therefore no promise to pay. And you take
10 from that an inference that if there is a sufficient link,
11 there is a promise to pay, and therefore the statute is either
12 not started or tolled, depending where we are.

13 MS. HUEDEPOHL: The inference from that case is --

14 THE COURT: What is the name of that case again?

15 MS. HUEDEPOHL: *Guth v. Hamlet*, perhaps. It's --

16 THE COURT: Is that sort of opposite inference from
17 the actual facts of the case your best authority for this
18 proposition --

19 MS. HUEDEPOHL: No, Your Honor.

20 THE COURT: -- under Virginia law?

21 MS. HUEDEPOHL: No, Your Honor. Under *Nesbit* and the
22 other cases that defendant cited, any writing that identifies
23 that an account exists and is properly being -- and the
24 creditor is properly attempting to collect it is sufficient to
25 restart the statute of limitations. Those cases would apply

1 equally to a situation where a payment is received and it does
2 identify the account or the debt for which the payment is made.

3 THE COURT: You get payment under this debt
4 management program for a period of time --

5 MS. HUEDEPOHL: Yes.

6 THE COURT: -- including a final payment in December
7 of '07.

8 MS. HUEDEPOHL: Yes, Your Honor.

9 THE COURT: Plaintiff takes some exception to that,
10 spending a little bit of time arguing that it's at least a
11 dispute of fact, if not clear, that plaintiff didn't make this
12 last payment. I guess I'm not sure why that matters. Does it,
13 in your view, matter who makes the last payment if it's clearly
14 linked to plaintiff's account? Plaintiff has an anonymous rich
15 uncle send in money. Does anybody care where the money came
16 from?

17 MS. HUEDEPOHL: Yes, Your Honor.

18 THE COURT: Why?

19 MS. HUEDEPOHL: Plaintiff's agent acts on behalf of
20 plaintiff and, in fact, the statute that says an action in
21 writing by a debtor or a debtor's agent sufficient for a court
22 to imply a promise to pay restarts the statute of limitations.

23 So if plaintiff has an anonymous rich uncle who
24 without plaintiff's permission sends in a payment on
25 plaintiff's account, I believe, Your Honor, that Virginia would

1 not restart the statute of limitations if the plaintiff
2 established that it was not with his authority or his
3 permission.

4 THE COURT: If you go a few months and the anonymous
5 rich uncle every month makes full payment, and plaintiff tells
6 you, "I'm not going to pay," you're saying that you could sue
7 plaintiff for nonpayment, even though there is no nonpayment?

8 MS. HUEDEPOHL: Well, Your Honor, that's a question
9 Virginia courts haven't decided, and I think it would be very
10 fact dependent on the case. But I agree, Your Honor, so long
11 as --

12 THE COURT: That seems a little odd if you're getting
13 paid, even though the borrower doesn't want you to get paid,
14 the borrower is saying, "I hate you, I'm never going to pay you
15 again," but somebody else pays -- I mean, let's just say it's
16 the start of the whole problem, and plaintiff says, "I'm making
17 this one last payment, I'm not going to pay anymore," but
18 somebody else pays, there's never a gap. You couldn't sue for
19 nonpayment, could you?

20 MS. HUEDEPOHL: I think, Your Honor, in those
21 circumstances, if the creditor were aware that the debtor was
22 denying the debt, the creditor could sue for anticipatory
23 repudiation at a minimum.

24 THE COURT: All right. So, in your view, the last
25 payment is by an agent of plaintiff, even in the light most

1 favorable to the nonmoving party here?

2 MS. HUEDEPOHL: Yes, Your Honor.

3 THE COURT: How?

4 MS. HUEDEPOHL: Both federal law and Oregon law
5 require that any third-party debt management agent who acted on
6 behalf of plaintiff enter into a signed agreement with
7 plaintiff. Under federal law, it's any for-profit entity, and
8 under Oregon law, as of 2007, it's any entity that charged a
9 fee.

10 THE COURT: So is it, in your view, undisputable that
11 the payment was made by an agent of plaintiff?

12 MS. HUEDEPOHL: Your Honor, I believe it is
13 undisputed. There was a deposition prior to this notice where
14 plaintiff testified at deposition that he was not aware of
15 having entered into any agreement. This document was
16 subsequently produced by Capitol One pursuant to subpoena, and
17 plaintiff has not denied entering into that agreement
18 subsequent to the document being produced.

19 THE COURT: Well, isn't the briefing in this summary
20 judgment omnibus hearing a form of denial?

21 MS. HUEDEPOHL: Your Honor, plaintiff repeatedly
22 states throughout his briefing "plaintiff doesn't know."
23 Plaintiff knows he did not write the \$55 checks himself, but
24 repeatedly in the briefing, subsequent to the disclosure of
25 this document, plaintiff has said plaintiff doesn't know who

1 made the payments.

2 THE COURT: So, in your view, the question I have to
3 ask is could a juror come out any other way in the light most
4 favorable to plaintiff. And you say if jurors hear from
5 Capitol One that the payment was made by a third-party manager
6 who necessarily was in an agency relationship with plaintiff,
7 and Capitol One knows that's where the money came from, and
8 plaintiff tells the jurors, "I don't know who made the
9 payment," that in the light most favorable to plaintiff, no
10 rational jury could only find in favor of Capitol One on this
11 dispute?

12 MS. HUEDEPOHL: In the absence of a further statement
13 by plaintiff that "I did not retain a third-party debt
14 management agency to make payments," yes, Your Honor.

15 THE COURT: And therefore somewhere in there, around
16 the time of this last payment, waiting a little bit longer for
17 nonpayment in January, you get to the point where no payments
18 are being made -- we'll call that early February -- you still
19 contend that the clock hasn't started ticking on the statute of
20 limitations then, it's a few months later, when the first
21 lawsuit is filed?

22 MS. HUEDEPOHL: That is defendant's position, Your
23 Honor.

24 THE COURT: Because you're in the same boat as you
25 were in before the third-party manager showed up? You were

1 able to take some time, up to six months, to decide what to do
2 about all this?

3 MS. HUEDEPOHL: Capitol One was, yes, Your Honor.

4 THE COURT: That's what I meant by "you."

5 All right. Thank you.

6 MS. HUEDEPOHL: Yes, Your Honor.

7 THE COURT: We'll walk through the same sort of
8 series of events, then, for plaintiffs.

9 MR. PASSANNANTE: Yes, Your Honor.

10 THE COURT: I guess your contention is that --

11 MR. PASSANNANTE: The claim accrues when the default
12 occurs. Whether Capitol One waits six months to charge off the
13 balance is up to Capitol One. That doesn't --

14 THE COURT: Well, let me just go through one at a
15 time, first of all. Are you contending the clock starts
16 ticking not when the last payment comes in but when the account
17 balance exceeds the credit limit? Is that really when you
18 think it starts?

19 MR. PASSANNANTE: I think that's when the account
20 accrues, that's when it's first breached, and I think there was
21 a missed payment --

22 THE COURT: But is it a breach or is it just
23 susceptible of being a breach?

24 MR. PASSANNANTE: I think it's a breach. I think the
25 agreement calls for a credit limit, and the agreement calls

1 that if you exceed the credit limit -- I mean, that's a breach
2 of contract. Whether or not -- how Capital One deals with it
3 does not determine whether or not there's a breach.

4 THE COURT: Well, it does if the contract language
5 says that it's capable of being viewed as a breach. So what
6 does the contract language say on that score? If it's
7 discretionary, then it's not a breach until they say it is.

8 MR. PASSANNANTE: I think as far as the account
9 closure and suspension of credit privileges --

10 THE COURT: I'm interested in how the contract treats
11 exceeding the credit limit.

12 MR. PASSANNANTE: Your Honor, I'm sorry. I'm trying
13 to figure out where the default provision is again.

14 So the default language -- I think this is Exhibit 1.
15 "We may, in our sole discretion, declare default of this
16 agreement if we don't receive full payment."

17 That provision calls -- declares a default if you
18 don't make the full amount of any minimum payment, you exceed
19 any credit limit, an item used to make payment on your account
20 is not honored or cannot be processed.

21 THE COURT: And the sentence you read that started
22 with "we may," what's that sentence?

23 MR. PASSANNANTE: It does start, "We may, in our sole
24 discretion." So that's a different issue to me as to whether
25 or not there's a breach. There's a breach because there's a

1 default. Whether or not they exercise their right to declare a
2 default shouldn't toll the statute of limitations.

3 THE COURT: What's the sentence say? "We may" what?

4 MR. PASSANNANTE: "We may, in our sole discretion,
5 declare a default under this agreement."

6 THE COURT: So how is there a default if they have
7 the discretion to say it's not a default and exercise that
8 discretion?

9 MR. PASSANNANTE: So as a part of the agreement,
10 there's a credit limit, and it says, under that credit limit,
11 "You agree not to allow the balance of your account or the
12 balance of the applicable segments of your account to exceed
13 the credit limits."

14 That's part of the agreement as well. So once that
15 account goes over, that's a breach of the agreement.
16 Whether -- there's a different issue about whether it's a
17 breach of the agreement. The agreement says, I'm not going to
18 let my credit limit go over that amount. Once it does, they've
19 breached that provision of the agreement, Your Honor. Then
20 Capitol One has an election to declare a default or not. But
21 whether or not they decide to declare a default doesn't toll
22 the statute of limitations. The breach occurs when it went
23 over the credit limit, because that's -- Mr. Carlos, as with
24 any other cardholder, agreed not to exceed the credit limit.
25 That's when the breach occurred and that's when the claim

1 accrues. The claim doesn't accrue when Capitol One decides it
2 accrues. It accrues when there's a breach.

3 THE COURT: Do you need to speak to your partner for
4 a moment?

5 MR. PASSANNANTE: I think Mr. Newton is also
6 indicating that Capitol One also charges for it. But I think
7 your question had to do with whether or not exceeding the
8 credit limit in and of itself constitutes a breach or is only a
9 breach if Capitol One says it is. And I just referred to the
10 card agreement that says: I agree I won't go over the limit.
11 If you agreed not to go over the limit, and then you go over
12 the limit, that's a breach. How Capitol One decides to treat
13 that breach I think is up to Capitol One.

14 THE COURT: That's not my question. My question is
15 if Capitol One, learning of a violation of the agreement, says,
16 "We're not going to declare you in default of this agreement,"
17 then why doesn't that prevent the statute start running? If
18 you're not in default under the terms of the agreement -- I
19 assume, for example, that Capitol One couldn't write a letter
20 to a cardholder, saying, "We've decided not to declare you in
21 default. You pay \$55 a month, we'll just keep working with
22 you." I'm assuming Capitol One couldn't do that and go sue
23 that person.

24 MR. PASSANNANTE: I agree. Once they're starting to
25 take payments, they can't. The question is two separate

1 questions. The statute of limitations accrues when the claim
2 accrues. The claim accrues upon the breach. If Capitol One
3 comes in and says, "We're waiving this breach and we're
4 deciding not to declare a default," that doesn't mean that
5 there wasn't a breach.

6 THE COURT: So do you agree then that when they start
7 taking payments from this third-party debt management program,
8 that if the clock had started running earlier, it quit running
9 once they started taking payments again?

10 MR. PASSANNANTE: I think in this particular case
11 that could be a question of fact because Mr. Carlos doesn't
12 recall making any of those payments and he said he didn't know.
13 The letter from Capitol One seems to acknowledge and state that
14 they received a letter from a third-party debt management
15 agency. We don't believe that that constitutes a written
16 agreement to pay the principal and interest. It's a
17 third-party letter. And, actually, Capitol One's letter simply
18 acknowledges receiving a letter from a third party saying that.
19 Mr. Carlos --

20 THE COURT: So if the facts were a little clearer,
21 though, someone quits paying, nothing happens -- that is,
22 Capitol One does nothing for a while -- in your view, they're
23 in breach of the agreement and the clock has started ticking.

24 And then you would agree in the abstract that if that
25 person then starts paying again and Capitol One agrees to

1 receive payment, having not yet done anything, that --

2 MR. PASSANNANTE: I think that would toll the
3 statute, Your Honor, on the written promise to pay, even under
4 Virginia law.

5 THE COURT: And then in your view, if that had
6 happened with this third-party management agency, then
7 somewhere around the time of the last payment, the clock would
8 start ticking again. Capitol One wouldn't get a few months to
9 decide what to do about it, it would start ticking again?

10 MR. PASSANNANTE: They would have a few months to
11 start dealing with it. The question is whether the clock
12 starts ticking, which to me are two different questions. The
13 clock doesn't start ticking --

14 THE COURT: Yeah, I understand that. That is my
15 question, whether them taking a few months to decide what to do
16 about it, which they're entitled to do, in your view doesn't
17 toll the statute at all. It's that last payment or at least
18 one month later that the clock starts ticking again after
19 receiving renewed payments.

20 MR. PASSANNANTE: That would be the latest, Your
21 Honor, certainly, because it's like -- if you think about a car
22 accident, I get hit by a car on February 1st, I decide to think
23 about whether or not I want to bring a claim because they've
24 hit me doesn't mean the statute of limitations doesn't start
25 running until I've decided to make a claim for getting hit by

1 the car.

2 THE COURT: It's complicated enough under the FDCPA
3 without trying to draw analogies to car accidents.

4 MR. PASSANNANTE: My apologies.

5 THE COURT: I get your point, though.

6 Let me ask you this.

7 MR. PASSANNANTE: The other issue --

8 THE COURT: Excuse me. Let me ask you this question.
9 We've talked about your view of the -- what I'll call the
10 inactive periods between last payments and Capitol One action,
11 and we've talked about the period of time of third-party
12 payments.

13 MR. PASSANNANTE: Correct.

14 THE COURT: Which you contend doesn't toll the
15 statute here for somewhat particular reasons to this case. It
16 might in other cases, but in your view doesn't in this case.

17 MR. PASSANNANTE: Correct.

18 THE COURT: Let's talk about the filing of a lawsuit
19 itself, the first lawsuit. Why wouldn't that lawsuit, from
20 something like filing to dismissal, toll the statute of
21 limitations?

22 MR. PASSANNANTE: The dismissal wasn't a decision on
23 the merits, but there was an arbitration, there was a decision
24 on the merits. I think typically that lawsuit could toll, but
25 the only reason that --

1 THE COURT: I don't want to talk about could. Let's
2 start with the filing. At some point after the first lawsuit
3 is filed, August 6th of '09, wouldn't normally in that case a
4 lawsuit being filed on the debt toll the statute of
5 limitations? I mean, that's the whole point, to get them to
6 file.

7 MR. PASSANNANTE: Correct, Your Honor. Normally that
8 would toll. Virginia law --

9 THE COURT: Let me finish my question. Why isn't
10 that what's happening here?

11 MR. PASSANNANTE: Because there was a decision in
12 that particular lawsuit, and Virginia statute controls. Oregon
13 has got a different statute that says the filing of a lawsuit
14 will toll. I believe when the statute of limitations expires
15 during the pendency of the action, then you've got 180 days
16 after that. It actually doesn't toll, it extends the statute
17 of limitations for 180 days.

18 Virginia's statute is a little bit different. I
19 think it's really a matter of state law and it's a matter of
20 statutory interpretation. Virginia's state law says that if
21 the filing of the lawsuit is dismissed without a decision on
22 the merits, it tolls the statute of limitations.

23 Here there was actually an arbitration. The problem
24 with that lawsuit is that arbitration never got reduced to a
25 judgment, other than a judgment of dismissal. So there was a

1 hearing, a decision on the merits. That would be the only
2 question about not tolling this statute of limitations.

3 Our fundamental position is that if it's a three-year
4 statute that applies, that doesn't matter either, Your Honor,
5 because there's still --

6 THE COURT: I still want to try to deal with it,
7 though. So your view on the statute of limitations with
8 relation to the first lawsuit is that it just wasn't of a
9 character that ends up tolling the statute of limitations?

10 MR. PASSANNANTE: Because it was actually pursued
11 through an arbitration decision, and the statute in Virginia
12 says that a dismissal without a decision on the merits operates
13 to toll the statute of limitations. The fact that Capitol One
14 with their previous lawyer chose not to pursue that claim
15 further takes it outside the Virginia statute.

16 If the Court finds that --

17 THE COURT: That seems a little odd. I mean, if you
18 have a decision on the merits, you don't need to toll the
19 statute, because that's the whole point. Then you're done with
20 the case.

21 MR. PASSANNANTE: I agree with that.

22 THE COURT: If you have a decision that's not on the
23 merits, you know, the case gets dismissed by the plaintiff, for
24 example, without prejudice, then you're going to toll the
25 statute, I guess, between the filing and the dismissal,

1 basically?

2 MR. PASSANNANTE: Correct. And that's what the
3 Virginia statute holds.

4 THE COURT: This is sort of in between. This is a
5 decision sort of on the merits but not reduced to judgment?

6 MR. PASSANNANTE: Correct.

7 THE COURT: So you think I ought to treat that more
8 like a decision on the merits which doesn't toll the statute
9 than a decision on the merits which does?

10 MR. PASSANNANTE: Correct. If you look at the
11 statute of limitations -- or that tolling provision, it says a
12 decision not on the merits, which is designed to say, well,
13 look, you filed, so you've expressed an intention, you've given
14 notice to the other side, but it never ended up resulting in a
15 decision. Maybe there was some reason to voluntarily dismiss
16 where it wasn't decided on the merits. Because nobody had
17 their day in court, we're tolling.

18 Here Capitol One, for whatever reason -- maybe
19 they've got a claim against their previous lawyer -- did not
20 reduce their previous action to a judgment. The fact that they
21 didn't do that shouldn't now give them the right to say, oh,
22 and when we had that going, the statute should be tolled. It
23 falls outside the statute on tolling.

24 THE COURT: Thank you.

25 Let's go backwards just a little bit in our

1 discussion. What's your best authority for the idea that the
2 period between some sort of breach of the contract -- let's
3 just go with the simplest one, non-payment -- and the period in
4 which Capitol One exercises its contractual right not to
5 declare the person in default nevertheless starts the statute;
6 what's your best Virginia authority for that proposition?

7 MR. PASSANNANTE: Your Honor, I think it's the
8 statute itself. And if I could refer to our motion for summary
9 judgment, our original briefing pointed out that what starts
10 the statute of limitations is when the claim accrues. That
11 claim accrues when there's a breach. Again, I think you go
12 back to the contract.

13 THE COURT: Would you read me the statutory language
14 you're referring to.

15 MR. PASSANNANTE: So it's on page 19, where we
16 address accrual. "The cause of action accrues" --

17 THE COURT: I'm sorry. I'm going to ask you as
18 you're reading to slow down.

19 MR. PASSANNANTE: My apologies.

20 THE COURT: Go ahead and read me the statutory
21 language you're relying on.

22 MR. PASSANNANTE: Your Honor, I think it was in a
23 case. The first one was on -- "The cause of action on a note
24 accrues when the obligation to pay is breached," *Rivera v.*
25 *Nedrich*, 259 Va. 1. It's a 1999 case.

1 THE COURT: So you heard your opponent discuss the
2 differences between this setting and the setting of the
3 promissory note. What do you make of her argument that the
4 statute of limitations on a promissory note doesn't apply very
5 well here?

6 MR. PASSANNANTE: Well, I think that going down in
7 our brief, we cite to a claim on an account, and that is
8 *Columbia Heights v. Griffith-Consumers Company*, 205 Va. 43rd --
9 43. "It is well-settled jurisdiction that the statute of
10 limitations begins to run from the time the account is due."

11 So the best argument that they have is, well, under
12 federal law --

13 THE COURT: Well, let me just back you up. I'll tell
14 you their best argument, and I'm curious what you think of it.
15 Their best argument is that the account is not due if you've
16 breached your obligation to pay but the credit company has
17 said, "Well, you're not in default."

18 MR. PASSANNANTE: Judge, but they're not saying
19 you're not in default. They're making election to wait to
20 charge off for six months.

21 THE COURT: Not quite. They're not saying that
22 you're not in breach, but they are saying you're not in
23 default. That's exactly what the contract allows them to say.

24 So why doesn't saying you're not in default mean that
25 the account is not due? You may be in breach but your payment

1 is not due.

2 MR. PASSANNANTE: Well, they kept saying -- they kept
3 sending statements, Your Honor. If you look at each one of the
4 statements, it asks for a payment to be due, a minimum amount
5 due. Even with the agreement with the third-party debt agency,
6 that required payments of \$55. What federal law says is that
7 you can't declare the entire balance due until you have
8 declared charge-off, which occurred in August of 2008. Federal
9 law did not require them to wait six months. That's up to
10 Capitol One. Just because you wait to assess or to declare
11 that the entire balance is due doesn't mean that the statute of
12 limitations doesn't begin to run, because the cause of action,
13 their right to declare that amount full and due accrued when
14 the breach occurred. That's when their right accrued. The
15 fact that they don't exercise that right for a period of time
16 doesn't toll the statute of limitations, and there's nothing in
17 the Virginia statute of limitations that indicates it would be
18 tolled while the creditor thinks about what they want to do.

19 THE COURT: Thank you.

20 We didn't talk about the first lawsuit much itself.
21 So your view on -- I guess this falls between two
22 possibilities, neither of them exactly this case: One, that
23 the statute is tolled if the case doesn't get resolved on the
24 merits; and two, where the statute, I guess, is not tolled if
25 it is resolved on the merits. But we understand why that would

1 be, because then the case is over; you don't need the statute
2 anymore.

3 I guess you'd pick the -- this is a lot closer to the
4 former than the latter?

5 MS. HUEDEPOHL: Yes, Your Honor. The Virginia
6 statute refers to a judgment dismissing the case. The judgment
7 in this particular matter dismissed without prejudice; that is,
8 under ORCP 54, all judgments, unless they state otherwise, are
9 without prejudice.

10 It's important to note, Your Honor, that it is the
11 arbitrator who failed to reduce the award to judgment. It's
12 not the plaintiff who failed to reduce the award to judgment.

13 It's also important to note that plaintiff had an
14 absolute right to trial de novo even if the arbitrator had
15 timely filed the award. The right to the judgment itself had
16 not yet accrued because the court was required to give
17 plaintiff -- I think it's 21 days to ask for a trial de novo,
18 and if he asked for it, the court was required to give it to
19 him. So there was no thorough right or entitlement to a
20 judgment at the time that the court dismissed without
21 prejudice.

22 It's also worth noting, Your Honor, that Virginia
23 courts have repeatedly stated that the current version of the
24 tolling statute consolidates and expands Virginia's prior
25 statute of limitations, and the prior statute of limitations

1 explicitly stated that a suit may be reinstated where arrest or
2 reversal is upon a ground which does not preclude a new cause
3 of action for the same cause.

4 So the prior statute was slightly more explicit in
5 the way that it was worded, and the current courts of Virginia
6 say that the new statute is an expansion and consolidation that
7 greatly expanded the circumstances, and defendant has located
8 no case where Virginia said that the new tolling statute in any
9 way circumscribed or limited a right that was previously
10 available.

11 THE COURT: Any final thoughts on accrual, having
12 heard your opponent's arguments?

13 MR. PASSANNANTE: Judge, I think I outlined them, and
14 I think that --

15 THE COURT: I'm sorry, I was talking to her first.

16 MR. PASSANNANTE: Oh, I'm sorry. I thought you were
17 looking at me. My apologies.

18 THE COURT: No, that's all right. I should have used
19 names, not just pointing my eyes at somebody.

20 I'm asking you, ma'am. You heard our discussion on
21 accrual under Virginia law, and there are really three
22 different terms in play: breach, default, and due. So how do
23 you sort those out, in terms of Virginia not telling us when
24 the cause of action first accrues?

25 MS. HUEDEPOHL: My first response, Your Honor, is

1 that Virginia hasn't given a clear answer, and under that
2 circumstance, there should not be an FDCPA violation because
3 plaintiff cannot prove his case.

4 Setting that aside for the moment, federal law
5 prohibited Capitol One from collecting from plaintiff prior to
6 charge-off. Because of that, the statute -- Capitol One's full
7 right to accrue on the account wasn't caused by the breach.
8 That is caused by the default that is governed by the contract
9 and the company's charge-off. Capitol One allowed itself the
10 contractual right to postpone declaring a breach to be a
11 default.

12 THE COURT: What's the choice of law issue if your
13 opponent is right about breaching the law?

14 MS. HUEDEPOHL: In that case, Your Honor, Oregon has
15 a firm policy favoring settlements, and it is defendant's
16 opinion, Your Honor, that if the slightest breach causes the
17 action to accrue in Virginia, regardless of what good faith
18 efforts the plaintiff may take thereafter to try and correct
19 it, there is no way to distinguish between a slight breach or a
20 material breach under the arguments that plaintiff have put
21 forth under Virginia. Either your new promise is in writing or
22 it's not.

23 And so because Virginia law has such a clear
24 distinction about whether or not an additional agreement will
25 actually toll the statute of limitations, in Oregon, if a

1 slight breach is enough to do it and the creditor will be
2 forced to take every single debtor who made a payment one day
3 late one time three years ago into court, it is defendant's
4 opinion that the Oregon courts would not do that, and that does
5 not provide a fair opportunity to pursue a case where the
6 debtor has since been making payments, and if that is what the
7 Oregon courts decided, because it violates a public policy of
8 Oregon favoring settlement and favoring allowing debtors an
9 opportunity to recover from a small, insignificant mistake, and
10 because Oregon's six-year statute of limitations based on the
11 date of last payment would be materially different, Oregon's
12 six-year statute of limitations would apply, and the cause of
13 action accrued December 29th, 2007.

14 THE COURT: Do you have Oregon authority for the idea
15 that the statute of limitations would not start running upon
16 initial breach?

17 MS. HUEDEPOHL: Yes, Your Honor. There's a statute.
18 If you give me one moment, I will be able to cite it to you.

19 It is Oregon Statute 12.090. The later of the last
20 charge or the last payment establishes the date of accrual on a
21 contract.

22 THE COURT: Mr. Passannante, final -- the final
23 discussion before I take a break here. What's your view, then,
24 on the choice of law question? Just tell me first, do you
25 agree that this sort of difference, if there is one, between

1 Virginia and Oregon law would trigger the application of Oregon
2 law under the choice-of-law provisions in this case?

3 MR. PASSANNANTE: I don't, Your Honor. I don't
4 think -- there's a difference between whether there's a breach
5 and when you bring a claim or the claim accrues. For instance,
6 if you --

7 THE COURT: Let me ask you this first. Does Oregon
8 law make last payment the later of the -- does Oregon law make
9 it true that among various things that could happen, it's the
10 later of several, including one of them being the last payment,
11 starts the statute of limitations?

12 MR. PASSANNANTE: Yes, Your Honor. I don't disagree
13 with that. I think Oregon's statute is pretty clear that
14 payments -- it's the last payment that starts the accrual -- it
15 starts the accrual over again. So you could have an amount due
16 on the 1st, payment is made on the 30th, and then the clock
17 restarts, essentially, for each payment.

18 THE COURT: So for your purposes, that really doesn't
19 matter much here because it just -- instead of maybe exceeding
20 the credit limit, it would be just the last payment being due
21 January of '07?

22 MR. PASSANNANTE: The last payment due in January of
23 '07. Each one of their statements demanded a payment to be
24 due, and then I believe it was March 31st, 2007, the account
25 was actually closed by Capitol One. The letter where they

1 acknowledge receiving something from a third-party debt
2 management agency, it says your account is closed. They did
3 the charge-off in August of 2008.

4 So, I mean, at a certain point, you know, I guess
5 there's a difference between breach and then waiting six months
6 to declare a default doesn't mean the statute is going to toll,
7 because Capitol One didn't have to wait that long. They chose
8 to wait that long. It doesn't trigger the statute of
9 limitations.

10 And then the filing of the lawsuit occurred a year
11 after the charge-off, and Ms. Huedepohl is arguing that it was
12 the lawsuit that actually started the statute of limitations.
13 And if the lawsuit started the claim accrual, how could you
14 file a lawsuit, because have you no claim until you file a
15 lawsuit. So I don't understand how the lawsuit could be the
16 date that the claim accrues, because you can't file a lawsuit
17 unless you have a claim. And the latest -- it's the 2008
18 charge-off, at the very latest, and I actually think it's when
19 he first missed his payments. The fact that Capitol One chose
20 not to take action for a period of time doesn't mean that their
21 claim didn't accrue. Those amounts were due when they were due
22 and the statements made them due. They sent statements saying
23 they're past due.

24 THE COURT: Thank you.

25 I'll take a brief break and I'll have more questions

1 perhaps after the break.

2 THE CLERK: This court is in recess.

3 (A recess is then taken.)

4 THE COURT: Here's what I'm going to do. I'm going
5 to lay out some parameters for how I think the statute of
6 limitations question should be resolved, and by my
7 calculations, that puts us at somewhere between 59 and 61
8 months, depending on how you count things. And I'm going to
9 give you an opportunity -- not now, but by letter brief shortly
10 afterwards, to crunch the numbers yourselves and tell me what
11 you come up with.

12 So parameter number one, I resolve as a matter of law
13 the question of whether this is a written contract or not by
14 finding that it is, in fact, a written contract. I agree with
15 the analysis of Judge Smith, his opinion on the subject, and
16 with the analysis of the Virginia attorney general, and find
17 that it is a written contract, thereby triggering the five-year
18 statute of limitations under Virginia law, unless the conflict
19 of law rules requires Oregon's six-year statute of limitations.
20 I don't believe they do, but I'll entertain that later.

21 I also find that no rational jury could find
22 otherwise than that the payments under the third-party
23 management arrangement were made by an agent of plaintiff up
24 through the last payment.

25 And I further find as a matter of law that the first

1 lawsuit in this case ought to be treated like a lawsuit that
2 did not result in final resolution of the case, thereby also
3 tolling the statute of limitations.

4 With those principles and rulings in mind, here's how
5 I roughly believe the calculations go. There are a couple of
6 spots where I'm only making approximations, and you'll have
7 your opportunity in your letter brief to me to be more precise
8 than I am right now. So don't fall down in panic when you hear
9 dates that don't match anything you brief.

10 So I believe that the way this works, then, is that
11 the statute of limitations would start running after the first
12 nonpayment. And that's a specific ruling on a relatively minor
13 issue, but it may become more important later, so let me
14 explain it.

15 I don't believe that the account balance being
16 exceeded -- exceeding the credit limit fits the statutory
17 definition of when a cause of action accrues very well, and
18 therefore I think it has to come with the first nonpayment.
19 Now, the undisputed record on the first nonpayment is that it
20 occurred by a payment of \$108.60 on January 31st of 2007. And
21 so obviously that's not when the account is in any sort of
22 arrears. And I'm only sort of just estimating of when it, in
23 fact, is in some kind of default status or at least potential
24 default status, and I'm pulling out March 1st of '07.

25 So you'll be able to explain to me whether you think

1 it's actually earlier than that or later than that that the
2 account is in arrears and the statute -- the cause of action
3 accrues and the statute runs.

4 What I am doing, at least with this initial
5 calculation, is giving plaintiff the benefit of the doubt by
6 starting the statute of limitations when the account holder has
7 failed to make an appropriate payment, and not giving defendant
8 the additional up to six months they might have to do nothing
9 about that and not trigger the statute.

10 So I am assuming, in other words, that at some point,
11 when the first nonpayment occurs and the party is in breach of
12 the contract by nonpayment, that the statute starts to run.
13 For my purposes, I've roughly called that March 1st of 2007.

14 The statute would run until the next major date,
15 which is the third-party arrangement, which begins sometime in
16 April of 2007. Again, to give plaintiff the benefit of the
17 doubt, I'm calling that April 30th, 2007, although I'm aware
18 that the letter may, in fact, be half a month earlier.

19 So that's approximately two months in which the
20 statute ran until it quit running, 1.5 to two months, and then
21 it quit running during that arrangement until after the last
22 payment under the third-party plan. And again, under the same
23 sort of estimation, since that payment was December 29th of
24 '07, I'm starting the clock again February 1 of 2008.

25 And you can give me your reasons why you think that's

1 wrong.

2 Approximately February 1 of 2008, about a month after
3 the last payment under the third-party plan, the clock starts
4 ticking again, and it runs until the first lawsuit is filed,
5 August 6th of 2009. And that's approximately 18 months that
6 the clock runs.

7 And then it stops running between the filing of the
8 first lawsuit in August 6th of 2009 and the dismissal of the
9 first lawsuit on March 4th, 2010.

10 And then it runs from March 4th, 2010, to the filing
11 of the second lawsuit -- which sort of ends our analysis -- on
12 July 19th, 2013, a period of approximately 41 months. So
13 that's either 59.5 or 60, or 60.5 or 61 months, depending on
14 how you count things.

15 I am not sure today how I would rule on the
16 interregnums that would occur whenever Capitol One has an
17 account holder, this plaintiff, in breach, but doesn't take
18 action. I've heard your arguments. I'm going to take a second
19 look at it. I'm not sure how that would work.

20 And, of course, if I went Capitol One's way on that,
21 then I wouldn't need your calculations. But since I'm not sure
22 how I would do that, and I may go plaintiff's way on that
23 argument, then I need to know your precise calculations, since
24 we're right around 60 months.

25 And I'm also not sure, although I'm dubious, that the

1 choice of law issue would affect the outcome in any way. I
2 think I am slightly more inclined to credit plaintiff's
3 argument on the choice of law issue than the -- that the Oregon
4 policy in favor of settlements doesn't really help us answer
5 this more precise question about which statute of limitations
6 ought to control in this case, Virginia's or Oregon's. And
7 without any real clear violation of a principle of Oregon law
8 in place, I don't think I would revert to the six-year, the
9 72-month statute of limitations in Oregon.

10 But I'll take some time to think those over while I
11 find out whether that's necessary, since I am confident that
12 this is a written contract with a minimum five-year statute of
13 limitations, and it may well be that we're under those five
14 years under the decisions I am making today.

15 So to be clear, I am deciding that it is a written
16 contract, I am deciding that it's a five-year statute of
17 limitations, I am deciding that it's tolled by the period of
18 time in which we have this third-party arrangement, and I am
19 deciding that it's tolled by the first lawsuit, from filing to
20 dismissal.

21 Can you give me a letter brief on your analysis of
22 the possibility that we're under that five-year statute of
23 limitations time period even without -- or even giving
24 plaintiff the benefit of the doubt on the sort of inaction
25 period that Capitol One claims it has the right to, within,

1 say, a week, just run these numbers and tell me where you think
2 we are?

3 MS. HUEDEPOHL: Yes, Your Honor.

4 MR. PASSANNANTE: Yes, Your Honor.

5 THE COURT: So a week from today, no more than a
6 five-page letter brief. I don't need you to reanalyze or
7 reintroduce the facts. Just tell me what the precise dates are
8 for starts and stops, the ones I've discussed, and why you
9 think those are the right dates.

10 Obviously, if I grant summary judgment to Capitol One
11 on this question, such that it didn't violate the FDCPA for
12 them to pursue the debt, then it would erase the need to
13 resolve the other class questions in the case. I'll wait to do
14 that when I decide whether that's the case or not.

15 Anything further from plaintiffs today?

16 MR. PASSANNANTE: Nothing further, Your Honor.

17 The only thing -- I guess one thing. There's an
18 overstatement claim as well in the brief that the Court hasn't
19 addressed, about overstating the amount of the debt. Are you
20 not resolving that today?

21 THE COURT: I'm not going to resolve it today. I'm
22 aware of it.

23 MR. PASSANNANTE: All right. That was my
24 understanding, but I wanted to check.

25 THE COURT: From the defense?

1 MS. HUEDEPOHL: Further clarification as well, Your
2 Honor. Has the Court determined -- has the Court made a
3 decision on the tolling as it relates to the debt verification
4 letters or is it simply reserving that until after the letter
5 briefs are submitted?

6 THE COURT: Whether the two letters that were sent in
7 actually tolled?

8 MS. HUEDEPOHL: Yes. The plaintiff sent letters that
9 prevented Capitol One's attorney from being able to file a
10 lawsuit, whether that tolled the statute of limitations.

11 THE COURT: Thank you for bringing that up. I'm of
12 the view that at least one of them does toll. They each tolled
13 for about a month, right?

14 MS. HUEDEPOHL: No, Your Honor. Unfortunately, one
15 tolled for about 30 days, as plaintiff recalls. The other
16 tolled for approximately 18 months, due to an error that
17 happened when the verification request was received by
18 defendants, and there is a bona fide error defense that's
19 preserved.

20 THE COURT: I guess my concern there is what I
21 haven't resolved -- I'm persuaded that in the abstract those
22 letters do operate as tolling. In this case I'm not persuaded
23 that -- at least I don't know the answer as to whether that can
24 ever be done twice. If I give you a lawsuit that has within it
25 a verification request and that tolling, how many times can

1 that happen? I'm not sure of the answer to that.

2 Do you have any thoughts on that?

3 MS. HUEDEPOHL: Yes, Your Honor. Plaintiff in his
4 brief suggested that the reason he sent a second verification
5 request was because the debt collector had changed and he
6 wanted verification that this second debt collector defendant
7 in this case in fact had a right to pursue him for the debt
8 that was -- that it undertook to collect. And when it did
9 that, defendant was required to respond.

10 Nothing about the fact that this is plaintiff's
11 second debt verification request changes the effect of the law
12 that defendant was required to provide him with. At a minimum,
13 Your Honor, I am aware of no case that says a second debt
14 collector is not required to verify a debt. And, Your Honor,
15 given --

16 THE COURT: It can go either way, right?

17 MS. HUEDEPOHL: Correct. And, Your Honor, given the
18 nature of the FDCPA, I think there's a real concern in
19 requiring debt collectors to take the risk.

20 THE COURT: And why would you get more than 30 days
21 on the second one?

22 MS. HUEDEPOHL: In this particular instance, Your
23 Honor, it's the length of time it actually took for the debt
24 collector to respond to the request. There's no statutory time
25 period. The FDCPA doesn't have a statute of ultimate repose.

1 It does not have any time period in which a verification
2 request must be provided. It typically does happen faster than
3 what happened in this case, but it's not required to happen at
4 a certain speed, and in this case the delay was solely
5 attributable to an error that occurred when plaintiff's
6 verification request was received. And so -- but to the
7 extent -- that is a bona fide error. To the extent that
8 defendant would have been entitled to tolling because it was
9 required to refrain from filing a lawsuit until it had
10 responded, to the extent it loses benefit of that tolling
11 because it took so long, defendant has asserted a bona fide
12 error defense, that despite procedures that were designed to
13 get responses to verification requests quickly, in this case
14 those procedures failed.

15 THE COURT: Thank you.

16 I'm not going to resolve this question, but of course
17 a month here or there may end up mattering. Do you wish to be
18 heard further on just this question of the impact on the
19 statute of limitations of the two verification letters?

20 MR. PASSANNANTE: Judge --

21 THE COURT: I should tell you, just to assure you,
22 although I failed bring it up in our oral argument, I am aware
23 of it. I have reviewed what you briefed.

24 MR. PASSANNANTE: Okay. I think we've got the same
25 position. The verification letter is merely to verify. It

1 doesn't constitute tolling under Virginia statute because it's
2 not an impediment to suit by Capitol One. It's not even an
3 impediment to suit by a particular law firm.

4 THE COURT: You disagree that they are forbidden from
5 suing until they verify?

6 MR. PASSANNANTE: I think there's a question about
7 forbidden and whether there's a claim that can be asserted. I
8 don't think that if they had filed, that that lawsuit would not
9 get dismissed. They might violate the FDCPA, but the lawsuit
10 itself would not get dismissed and say you can't bring this
11 claim because I asked for verification. Defendant's own
12 testimony --

13 THE COURT: Well, couldn't the defendant in a case
14 like that, say, move to dismiss for failure to grant me a
15 verification before filing?

16 MR. PASSANNANTE: I don't think that's one of the
17 rights granted by the statute. The statute allows for damages
18 and for violation of the act, but it doesn't preclude bringing
19 a state court claim from an otherwise valid debt. It gives
20 rise to liability of the debt collector.

21 The question then on the filing of the lawsuit, this
22 particular debt collector is not filing on any assigned claim,
23 it's whether or not Capitol One has a right to bring a suit or
24 not. In this particular case, Patenaude & Felix -- it's not
25 Patenaude & Felix's claim, it's Capitol One's claim. It's

1 whether or not they were prevented and whether or not they had
2 the right to bring the claim. I'm not aware of any FDCPA
3 holding that says, well, the debt collector attorney failed to
4 issue verification prior to filing the lawsuit, and the
5 necessary remedy for that is dismissal of the lawsuit,
6 particularly Capitol One's lawsuit, who is not covered by the
7 FDCPA.

8 THE COURT: All right. Thank you.

9 I'll take that under advisement. I look forward to
10 hearing -- or to seeing your calculations on these other
11 matters I've raised.

12 We'll be in recess.

13 MR. PASSANNANTE: Thank you, Judge.

14 MR. EIDENBERG: Thank you.

15 THE CLERK: This court is adjourned.

16 (Proceedings concluded.)
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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

/s/Bonita J. Shumway

2/4/2016

BONITA J. SHUMWAY, CSR, RMR, CRR
Official Court Reporter

DATE

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